

IN THE COURT OF CRIMINAL APPEALS

AT JACKSON

FEBRUARY 1997 SESSION

FILED

March 12, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

**SHERMAN ALEXANDER
HENDERSON,**)
)
)
Appellant,)
)
VS.)
)
)
STATE OF TENNESSEE,)
)
)
Appellee.)

C.C.A. NO. 02C01-9605-CR-00166

SHELBY COUNTY

**HON. W. FRED AXLEY,
JUDGE**

(Post Conviction)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

**JOE G. RILEY,
JUDGE**

OPINION

Petitioner Henderson appeals, pro se, from the denial of post-conviction relief. Henderson was convicted and sentenced to life and fifteen years for first degree murder and robbery by use of a deadly weapon. The sole basis for Henderson's petition is that the original trial court's "reasonable doubt" jury instruction was constitutionally infirm. Dismissing Henderson's petition without appointing counsel or an evidentiary hearing, the trial court ruled Henderson failed to state a claim for which relief could be granted. We affirm the judgment of the trial court.

STATUTE OF LIMITATIONS

Any relief has been barred by the three-year statute of limitations for post-conviction relief under T. C. A. § 40-30-102 (repealed by 1995 Tenn. Pub. Act 207, § 1). Apparently, this is Henderson's fifth post-conviction petition. In attacking the "reasonable doubt" jury instruction, he relies upon In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970) and Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The three year statute of limitations would have begun to run no later than 1990. It expired long before the filing of this petition in 1996.

The new Post-Conviction Act, T.C.A. 40-30-201 et. seq. (Supp. 1996), reduced the statute of limitations for post-conviction relief to one (1) year. The Act also provides for a one (1) year grace period from May 10, 1995, to file a petition or reopen a petition for post-conviction relief. The grace period does not apply in this instance because post-conviction relief was already barred by the statute of limitations when the legislation was enacted. The new Post-Conviction Procedure Act was not meant to revive previously barred claims. See Johnny L. Butler v. State, C.C.A. No. 02C01-9509-CR-00289, Shelby County (Tenn. Crim. App. filed December 2, 1996, at Jackson); but see Arnold Carter v. State, C.C.A. No. 03C01-

9509-CC-00270, Monroe County (Tenn. Crim. App. filed July 11, 1996, at Knoxville).

As a result, any post-conviction relief is time-barred.

WAIVER

Even if timely filed, this issue has been waived. A ground for relief is waived if the petitioner personally or through an attorney fails to raise it for determination in any proceeding before a court of competent jurisdiction. T. C. A. §40-30-206 (g)(Supp. 1996). In his first petition Henderson was given a full evidentiary hearing and apparently raised several issues for review including his lawyer's competency. This Court affirmed the denial of relief. The next three petitions were all dismissed without an evidentiary hearing on the grounds that all issues had been waived, previously determined, or time barred. We are unable to determine from the record the exact issues raised in Henderson's prior petitions; nevertheless, this issue has clearly been waived.

JURY CHARGE

Henderson argues the jury instruction defining "reasonable doubt" violates due process by lowering the burden on the state to prove guilt. Henderson challenges the following jury instruction:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Our courts have repeatedly held that using the phrase "moral certainty" in conjunction with an instruction that "reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation,

to let the mind rest easily as to the certainty of guilt” is a valid instruction on reasonable doubt. Nichols v. State, 877 S.W.2d 722, 734 (Tenn. 1994); State v. Sexton, 917 S.W.2d 263, 266 (Tenn. Crim App. 1995); Pettyjohn v. State, 885 S.W.2d 364, 366 (Tenn. Crim. App. 1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993). Therefore, this issue is without merit.

The judgment is AFFIRMED.

JOE G. RILEY, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

JOHN H. PEAY, JUDGE